MOUNT PLEASURE CORPORATION SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ABDUL AZIZ MOHAMAD JCA
RAUS SHARIF J
[CIVIL APPEAL NO: W-01-2-1998]
10 OCTOBER 2005

REVENUE LAW: *Income tax - Property - Appeal against assessments - Whether property acquired as an investment - Whether appellant succeeded in discharging onus that assessments erroneous - Income Tax Act 1967, s. 35(3)(a)*

REVENUE LAW: *Property tax - Assessment - Appeal against assessments - Whether property acquired as an investment - Whether appellant succeeded in discharging onus that assessments erroneous - Income Tax Act 1967, s. 35(3)(a)*

This was an appeal from the judgment of the High Court dismissing an appeal by the appellant against the decision of the Special Commissioners of Income Tax ('the Special Commissioners'). The appellant, the purchaser of five holdings ('the said property') for RM570,000 in 1971, had submitted layout plans to construct a hotel complex, a theatre club and a casino on the said property. Instead, the layout plans for the alternative use and development of the said property, namely, commercial and housing development, were approved in 1979. By a notice of additional assessment dated 11 May 1989, for the year of assessment 1984, the appellant was assessed for income tax by the respondent amounting to RM1,464,986.30 based on the original cost of the said property. Likewise, for the years of assessment 1985 to 1987, by notices of additional assessment dated 22 July 1989, assessments were raised by the respondent based on the original cost of the said property as at 1971.

The appellant appealed to the Special Commissioners against the said additional assessments, raising the issue of whether the cost of the said property should be the market value in 1978 or the actual cost when the said property was acquired in 1971. The Special Commissioners decided that the cost of the said property should be the original cost as at the year of acquisition in 1971 and not its market value in 1978 as stipulated in the provision of s. 35(3)(a) of the Income Tax Act 1967 ('the Act'). The appellant appealed against the said

decision to the High Court, which agreed with the decision of the Special Commissioners and dismissed the appeal with costs. Hence, the present appeal. The appellant submitted that the learned High Court judge was wrong to hold that there was overwhelming evidence before the Special Commissioners to justify their conclusion, when the evidence was consistent with the said property having been acquired by the appellant as an investment. The respondent, however, contended that the appellant's intention in purchasing the said property was not for investment but trading purposes and that the appellant had failed to discharge the onus that the assessments were erroneous.

Held (dismissing the appeal with costs)
Per Abdul Aziz Mohamad JCA and Raus Sharif J:

[1] In this instance, there was no admissible oral evidence to establish that the said property was acquired as an investment. The Special Commissioners, in deciding what was the intention of the appellant when it acquired the said property, made inferences from the facts proved and found that the said property was not the only property that the appellant dealt with at the material time. Together with the said property, the appellant had had five dealings in properties. Thus, the Special Commissioners were right to conclude that the appellant's frequent dealings raised a *prima facie* inference that the appellant was carrying on a business of land dealings either as a land developer or as a real estate merchant. As found by the Special Commissioners, the appellant had failed to rebut the said inference. (pp 535 h & 536 a)

[2] The Special Commissioners also pointed out that the presumption against the appellant was further strengthened by the fact that the appellant's memorandum and articles of association did not authorize it to purchase land for purposes of investment except with surplus funds, which it did not have. From the evidence, the purchase of the said property was financed by family funds. This fact did not support the appellant's contention that the said property was acquired for investment. (p 536 c)

[3] The Special Commissioners further found that even though the appellant claimed that the said property was transferred as a stock-in-trade in 1978, the said property remained as a fixed asset in the appellant's account until 1982. The appellant offered no explanation for this discrepancy. Hence, the Special Commissioners were right in their findings that the appellant's accounts did not support the appellant's contention that the said property was acquired as an investment. (p 536 d)

[4] There was sufficient evidence to support the Special Commissioners' findings that the said property was not acquired in 1971 as an investment and that the appellant had failed to discharge the onus on him that the assessments by the respondent were erroneous. (p 536 e)

[5] Section 35(3)(a)(i) of the Act, upon which the appellant took its stand, could not apply in this case. That was because the present case was concerned with stock that was immovable property and it was clear that the proviso to s. 35(3)(a) of the Act applies where immovable properties are concerned. (p 530 e-f)

[6] Since the dispute in this case fell within the confines of s. 35(3)(a) of the Act with the appellant standing on s. 35(3)(a)(i) and the respondent standing on the proviso to s. 35(3)(a), it must have been a dispute about the end-at value of the five holdings. The Special Commissioners, when they used the words "the cost of the said property" must be taken to have meant the at-end value of the said property. Taking it that way and also taking "the original cost when it was acquired in 1971" to be intended by the Special Commissioners as the "cost price to (the appellant)" of the said property that the proviso to s. 35(3)(a) of the Act intended, the Special Commissioners were correct in their decision and the learned judge was right in dismissing the appeal. (p 531 a-b)

Obiter

Per Abdul Aziz Mohamad JCA:

[1] Although the dispute in this case fell within the confines of s. 35(3)(a) of the Act and should therefore have been pursued with a close adherence to the provisions of para. (a), it appeared that the dispute was not so pursued before the Special Commissioners. The dispute became centred on the question of whether there was evidence that the holdings were purchased with the intention of keeping them as an investment, as the appellant contended, and the Special Commissioners examined that question, ending with the conclusion that in their view the property was acquired in 1971 as a trading stock. However, from the provisions of s. 35(3)(a), there was no element from which the question of whether the property was required for investment or trade could arise. What falls to be determined under para. (a) is the value of a stock-in-trade at the end of the basis period for the relevant year of assessment. It was not understandable how the value is affected according to whether the stock

was originally acquired for investment or trading. Even if, as contended by the appellant, the holdings were acquired in 1971 for investment and in 1979 were appropriated to stock, that would not make their stand on s. 35(3)(a)(i) correct as the proviso to s. 35(3)(a) applied to the holdings. (p 531 c-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana menolak rayuan perayu terhadap keputusan Pesuruhjaya Khas Cukai Pendapatan ('Pesuruhjaya Khas'). Perayu, sebagai pembeli lima hartanah pada tahun 1971 dengan harga RM570,000 ('hartanah tersebut'), telah mengemukakan pelan lakar untuk membina kompleks hotel, sebuah panggung dan sebuah kasino di hartanah tersebut. Walaupun begitu, apa yang diluluskan pada tahun 1979 adalah pelan lakar alternatif penggunaan tanah tersebut, iaitu untuk pembangunan komersial dan perumahan. Seterusnya, melalui notis taksiran tambahan bertarikh 11 Mei 1989, bagi tahun taksiran 1984, responden mentaksirkan cukai ke atas perayu sebanyak RM1,464,986.30 berdasarkan kos asal hartanah tersebut. Begitu juga, bagi tahun-tahun taksiran 1985 hingga 1987, melalui notis taksiran bertarikh 22 Julai 1989, taksiran telah dinaikkan oleh responden berdasarkan kepada kos asal hartanah tersebut pada tahun 1971.

Perayu merayu ke Pesuruhjaya Khas terhadap taksiran-taksiran tambahan berkenaan, dengan membangkitkan isu sama ada kos hartanah tersebut sepatutnya adalah harga pasarannya pada tahun 1978 ataupun kos sebenar sewaktu hartanah tersebut diperolehi pada tahun 1971. Pesuruhjaya Khas memutuskan bahawa kos hartanah tersebut adalah kos asal seperti pada tahun 1971 dan bukan nilai pasarannya pada tahun 1978 selaras dengan peruntukan s. 35(3)(a) Akta Cukai Pendapatan 1967 ('Akta'). Perayu merayu ke Mahkamah Tinggi tetapi Mahkamah Tinggi bersetuju dengan Pesuruhjaya Khas dan menolak rayuan. Perayu merayu seterusnya. Menurut perayu, hakim Mahkamah Tinggi khilaf dalam menyatakan bahawa terdapat banyak keterangan di hadapan Pesuruhjaya Khas bagi menjustifikasikan keputusan mereka, di mana keterangan adalah konsisten dengan hartanah tersebut diperolehi oleh perayu sebagai satu pelaburan. Responden, bagaimanapun, berhujah bahawa tujuan perayu membeli hartanah tersebut bukanlah untuk pelaburan tetapi adalah untuk tujuan berniaga, dan bahawa perayu gagal membuktikan bahawa taksiran-taksiran yang dibuat adalah salah.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Mohamad HMR dan Raus Sharif H:

[1] Dalam kes ini, tidak ada keterangan lisan yang menunjukkan bahawa hartanah tersebut diperolehi sebagai satu pelaburan. Pesuruhjaya Khas, dalam memutuskan apakah tujuan perayu apabila membeli hartanah tersebut, telah membuat inferens dari fakta-fakta yang telah terbukti dan mendapati bahawa hartanah tersebut bukanlah satu-satunya hartanah yang perayu terlibat pada waktu itu. Bersama-sama dengan hartanah tersebut, perayu terlibat dalam lima lagi hartanah. Maka itu, Pesuruhjaya Khas betul dalam merumuskan bahawa keterlibatan perayu yang kerap sedemikian telah membangkitkan inferens *prima facie* bahawa perayu menjalankan perniagaan dalam hartanah sama ada sebagai pemaju atau saudagar hartanah. Seperti yang diputuskan oleh Pesuruhjaya Khas, inferens ini gagal disangkal oleh perayu.

[2] Pesuruhjaya Khas juga menyatakan bahawa anggapan terhadap perayu diperkuatkan lagi dengan fakta bahawa memorandum dan artikel persatuan perayu tidak membenarkan perayu membeli tanah bagi maksud pelaburan kecuali jika terdapat lebihan dana, yang mana ia tidak ada. Dari keterangan, pembelian hartanah tersebut dibiayai oleh dana keluarga. Fakta ini tidak menyokong hujah perayu bahawa hartanah tersebut diperolehi untuk pelaburan.

[3] Pesuruhjaya Khas seterusnya mendapati bahawa walaupun perayu mengatakan bahawa hartanah tersebut telah jadikan 'stock-in-trade' pada tahun 1978, hartanah tersebut kekal sebagai aset tetap dalam akaun perayu sehingga 1982. Perayu tidak memberikan sebarang penjelasan atas percanggahan ini. Oleh itu, Pesuruhjaya Khas betul dalam dapatan mereka bahawa akaun perayu tidak menyokong hujah perayu bahawa hartanah tersebut diperolehi untuk pelaburan.

[4] Terdapat keterangan yang mencukupi bagi menyokong dapatan Pesuruhjaya Khas bahawa hartanah tersebut tidak diperolehi pada tahun 1971 sebagai satu pelaburan dan bahawa perayu gagal melepasi beban bukti bagi menunjukkan bahwa taksiran yang dibuat oleh responden adalah salah.

[5] Seksyen 35(3)(a)(i) Akta, di atas mana perayu menyandarkan kesnya, tidak terpakai kepada kes di sini. Ini kerana kes di sini tidak berkaitan dengan 'stock' yang berupa harta tak alih. Adalah jelas bahawa proviso kepada s. 35(3)(a) Akta terpakai jika harta-harta adalah harta tak alih.

[6] Oleh kerana pertikaian di sini terangkum ke dalam ruang litup s. 35(3)(a) Akta dengan perayu bergantung kepada s. 35(3)(a)(i) sementara responden pula bergantung pada proviso s. 35(3)(a), ia adalah satu perselisihan mengenai nilai 'at-end' kelima-lima hartanah. Pesuruhjaya Khas, apabila menggunakan perkataan "kos hartanah tersebut" harus diambil sebagai bermaksud nilai "at-end" hartanah tersebut. Menganggapnya sedemikian, dan mengambilkira bahawa apa yang dimaksudkan oleh Pesuruhjaya Khas dengan "kos asal apabila ianya diperolehi pada tahun 1971" adalah sebenarnya "harga kos (kepada perayu)" bagi hartanah tersebut sebagaimana yang dimaksud oleh s. 35(3)(a) Akta, maka Pesuruhjaya Khas betul dalam keputusan mereka dan yang arif hakim betul apabila menolak rayuan.

Obiter:

Oleh Abdul Aziz Mohamad HMR:

[1] Walaupun pertikaian di sini terangkum ke dalam ruang litup s. 35(3)(a) Akta dan harus dengan itu ditangani secara yang mematuhi dengan ketatnya peruntukan perenggan (a), pertikaian namun begitu tidak ditangani sedemikian rupa di hadapan Pesuruhjaya Khas. Pertikaian menjadi berkisar kepada persoalan sama ada terdapat keterangan bahawa harta telah dibeli dengan maksud menyimpannya sebagai pelaburan, sepertimana yang dihujahkan perayu, dan Pesuruhjaya Khas telah meneliti persoalan tersebut dan memutuskan bahawa pada pendapat mereka hartanah telah diperolehi pada tahun 1971 sebagai 'trading stock'. Bagaimanapun, berdasarkan peruntukan s. 35(3)(a), tidak wujud elemen di mana persoalan sama ada hartanah diperoleh untuk pelaburan atau perniagaan boleh berbangkit. Apa yang perlu diputuskan di bawah perenggan (a) adalah nilai 'stock-in-trade' di akhir tempoh bagi tahun taksiran yang berkenaan. Tidak dapat difahami bagaimana nilai boleh terjejas menurut sama ada 'stock' asalnya diperolehi untuk tujuan pelaburan ataupun perniagaan. Sekiranya, seperti yang dihujah perayu, harta-harta diperolehi pada tahun 1971 untuk pelaburan dan dijadikan 'stock' pada tahun 1979, itu tidak menjadikan pendirian mereka berkaitan s. 35(3)(a)(i) betul, kerana proviso kepada s. 35(3)(a) terpakai kepada harta-harta tersebut.

Case(s) referred to:

Chua Lip Kong v. DIR [1982] 1 MLJ 235 ***(refd)***
Director-General of Inland Revenue v. LCW [1975] 1 MLJ 250 ***(refd)***
Edward v. Bairstow and Harrison [1956] AC 14 ***(refd)***
I Investment Ltd v. Comptroller-General of Inland Revenue [1975] 2 MLJ 208 ***(refd)***
Lower Perak v. KPHDN [1994] 3 CLJ 540 SC ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 33, 34, 34A, 34B, 35(1), (2), (3)(a)

Other source(s) referred to:
Whiteman on Income Tax, 3rd edn, p 165

For the appellant - Goh Ka Im (Elaine Lee Pei Sze with her); M/s Shearn Delamore & Co
For the respondent - Ahmad Khairuddin Abdullah (Noor Kamaliah Mohamad Japeri with him)

[Appeal from High Court, Kuala Lumpur; Appeal No: R1-14-9-95]

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad JCA:
The basic facts, which are agreed facts, are as set out in para. 2 of the judgment of my learned brother Raus Sharif J, except that the date of the directors' resolution was 24 September 1971, not 4 September 1971. It was agreed before the Special Commissioners that the question for their determination was whether, to quote from para. 10 of the agreed statement of facts, "the cost of the said property should be the date *[sic]* when the said property was appropriated to stock in trade in the year 1978", as the appellants contended, or "its original cost as at 1971", as the respondent contended. There is, in the formulation of the question, to be seen another agreed fact, namely, that in 1978 the property was appropriated to stock-in-trade.

According to para. 8(iii) of the Special Commissioners' Case Stated, the appellants' contention was one under subparagraph (i) of para. (a) of subsection (3) of s. 35 of the Income Tax Act 1967. The Special Commissioners, at p. 25 of the case stated, held, in agreement with the respondent, "that the cost of the said property should be the original cost when it was acquired in 1971". Earlier, at p. 23 of the Case Stated the Special Commissioners said that "its cost would be the original cost as stipulated in the proviso" to the said para. (a). I assume from that that the contention of the respondent was one under the said proviso. It is clear, therefore, that the dispute on the resolution of which depended the question whether the assessments made, which were assessments of income tax, should be confirmed was a dispute falling under s. 35. I have, however, not being able to see, whether from the Case Stated or the written submissions in the High Court or in this appeal, in what manner actually the correctness of the assessments depended on the outcome of the dispute. For example, I have not been able to see to what figure, and

how, if the appellants succeeded in their contention, the assessment of RM1,464,986.30 for the year of assessment 1984 would be reduced. I am only informed, from reading the Case Stated, that since the respondent's contention was correct, the assessments were confirmed.

It is necessary to set out subsections (1), (2) and (3) of s. 35, as to which Suffian LP said in *Director-General of Inland Revenue v. L.C.W.* [1975] 1 MLJ 250 at p. 266 F-G (right) that they "are not at all clear, which is not a bit surprising considering that we are dealing with a very technical branch of the law". The subsections are as follows:

> (1) Notwithstanding any other provision of this Part, in ascertaining the adjusted income of a person from a business for the basis period for a year of assessment, the value of the stock in trade of the business at the beginning and at the end of that period shall be taken into account in accordance with the following subsections (that person, business, period and stock in trade being referred to in those subsections as the relevant person, the business, the relevant period and the stock respectively).
>
> (2) Where the value of the stock at the end of the relevant period exceeds the value of the stock at the beginning of the relevant period, the total of all amounts otherwise deductible under sections 33, 34 and 34A in ascertaining the adjusted income of the relevant person from the business for the relevant period shall be reduced by the amount of the excess; and, where the value of the stock at the beginning of the relevant period exceeds the value of the stock at the end of the relevant period, the total of all amounts otherwise so deductible shall be increased by the amount of the excess.
>
> (3) Subject to subsections (4) and (5):
>
> (a) the value of any particular item of the stock at the end of the relevant period shall be taken to be:
>
> (i) an amount equal to its market value at that time; or
>
> (ii) if the relevant person so elects and that item is physically tangible, an amount equal to the total cost to him of acquiring that item (or any materials used in its manufacture, preparation or construction) and bringing it to its condition and location at that time:
>
> Provided that in the case of any item of the stock consisting of immovable properties, stocks, shares or marketable securities, the value thereof at the end of the relevant period shall be taken to be an amount equal to its cost price to that relevant person or its market value at that time whichever is the lower;

(b) the value of any particular item of the stock at the beginning of the relevant period (except where the business was commenced by the relevant person in the relevant period) shall be taken to be an amount equal to its value as ascertained under paragraph (a) at the end of the basis period for the year of assessment immediately preceding the year of assessment to which the relevant period relates.

For income tax purposes, certain deductions are made from the gross income of a person so as to result in what is called the adjusted income. Sections 33, 34, 34A and 34B basically deal with the various deductions that shall be made from the gross income in order to ascertain the adjusted income from a source for the basis period for a year of assessment. The size of the adjusted income depends on the deductions. The greater the deductions the lesser will be the size of the adjusted income. Section 35 requires something else also to be done in order to ascertain the adjusted income of a person from a source, where the source is a business, for the basis period for a year of assessment. The thing to be done is to take into account the value of the stock-in-trade of the business both at the beginning and at the end of that basis period. There will in fact be two values. This requirement is stated in subsection (1).

Subsection (2) answers the question: What is to be done to take into account the two values? First, ascertain the total of all amounts that ss. 33, 34 and 34A require to be deducted in respect of the basis period. I shall refer to this total as "the total of deductions". Then compare the two values of the stock-in-trade. If the value at the end of the basis period ("the at-end value") exceeds the value at the beginning of the basis period ("the at-beginning value"), then the excess must be deducted from the total of deductions, thus reducing the total and increasing the adjusted income. If it is the converse, that is to say, if the at-beginning value exceeds the at-end value, then the excess must be added to the total of deductions, thus increasing the total and reducing the adjusted income.

Paragraph (a) of subsection (3) answer the question: What is to be taken to be the at-end value? Paragraph (b) of subsection (3) answers the question: What is to be taken to be the at-beginning value?

The fact that the appellants stood on subparagraph (i) of para. (a) of subsection (3) and the respondent stood on the proviso to that paragraph could only mean that the dispute in this case was only as to the at-end value of the stock that was the subject of the dispute, namely, the five holdings, which are immovable property. The word is "value", and therefore the word "cost" used in para. 10 of the agreed statement of facts in the formulation of the question to be answered by the Special Commissioners is inappropriate and misleading.

Any dispute under subsection (3) as to the value of stock has to mean ultimately a dispute as to the correct amount of the adjusted income of a person from a business for the basis period for the relevant year of assessment. In this case the relevant years of assessment were 1984, 1985, 1986 and 1987, for it was against the assessments of income tax for those years of assessment that the appellants appealed to the Special Commissioners. Taking, say, the year of assessment 1984, one's concern under para. (a) of subsection (3) would be to determine the at-end value of the stock, that is the value at the end of the basis period for the year of assessment 1984. Standing on subparagraph (i) of paragraph (a), the appellants should be contending that the value of the stock at the end of the basis period for the year of assessment 1984 should be "an amount equal to its market value at that time", that is to say, at the end of the basis period for the year of assessment 1984. I therefore have not been able to understand why the formulation of the question, as far as it reflects the appellants' contention, suggests that the at-end value of the property should be its market value when the property was appropriated to stock-in-trade in 1978, since 1978 can have nothing to do with the basis period for the year of assessment 1984. If you stand on subparagraph (i) of para. (a) in relation to that year of assessment, you cannot do otherwise than contend for the market value of the stock at the end of the basis period for that year of assessment, that is, 1984.

But whatever may be the answer to my difficulty about the year 1978, subparagraph (i) of para. (a), on which the appellants take their stand, cannot apply in this case. That is because it is clear from the proviso to para. (a) that where immovable properties are concerned the proviso is to apply. This case is concerned with stock that is immovable property. According to the proviso, to determine the at-end value of the stock, two amounts will first have to be ascertained. One is the amount of the "cost price to (the appellants)" of the five holdings. The other is the market value of the five holdings "at that time", that is to say, at the end of the basis period for the year of assessment concerned. This second amount is the same as the amount in subparagraph (i) that the appellants contend for. By the important words "whichever is the lower", the at-end value is the lower of the two amounts.

The five holdings were bought in 1971 for RM570,000. I do not find the Special Commissioners making a finding of the amount of the "cost price to (the appellants)" specifically in those words. An amount of RM924,343 is mentioned on p. 25 of the Case Stated. I have to take the cost price as either of those two sums. As to the second amount, it would appear from p. 24 of the Case Stated that the appellants, standing on subparagraph (i) of para. (a), contended for the sum of RM25,930,000. The lower amount would be the amount of the cost price to the appellants. As I said, the Special Commissioners

held that "the cost of the said property should be the original cost when it was acquired in 1971". Since, as I said, the dispute in this case fell within the confines of para. (a) of subsection (3), with the appellants standing on subparagraph (i) of para. (a) and the respondent standing on the proviso to that paragraph, it must be a dispute about the at-end value of the five holdings, I take the Special Commissioners, when they used the words "the cost of the said property", to mean the at-end value of the property. Taking it that way and also taking "the original cost when it was acquired in 1971" to be intended by the Special Commissioners as the "cost price to (the appellants)" of the property that the proviso to para. (a) intends, I am of the view, for the reasons that I have stated, that the Special Commissioners were correct in their decision and that the judge was right in dismissing the appeal.

Although, as I perceive it, the dispute in this case fell within the confines of para. (a) of subsection (3) and should therefore have been pursued with a close adherence to the provisions of that paragraph, it appears to me that the dispute was not so pursued before the Special Commissioners. According to para. 8 of the Case Stated, the appellants' contention in standing on subparagraph (i) of para. (a) was that when they acquired the property in 1971, it was intended for investment and to be retained as a fixed asset, that later they changed the intention to one of trading and that in 1979 (1978 according to para. 10 of the agreed statement of facts) the property was appropriated to stock-in-trade. The respondents, on the other hand, taking their stand on the proviso to para. (a), contended that when the property was purchased in 1971 it was intended to be traded and was stock-in-trade and that there was no change of intention on the part of the appellants. In view of such contentions, the dispute became centred on the question whether there was evidence that the holdings were purchased in 1971 with the intention of keeping them as an investment, as the appellants contended, and the Special Commissioners, for the most part of the Case Stated, examined that question, ending with the conclusion at p. 21 that in their view the property was acquired in 1971 as a trading stock. But, the provisions of para. (a) of subsection (3) being as they are, I have not been able to see from what element in the paragraph the question of whether the property was required for investment or trade could arise. What falls to be determined under para. (a) is the value of a stock-in-trade at the end of the basis period for the relevant year of assessment. I have not been able to understand how the value is affected according to whether the stock was originally acquired for investment or trading. Even if, as contended by the appellants, the holdings were acquired in 1971 for investment and in 1979 were appropriated to stock, I am not able to see that that would make their stand on subparagraph (i) of para. (a) correct, seeing that, the holdings being immovable property, the proviso to para. (a) has to apply, with the consequence that I have shown.

I have an uneasy feeling that for my inability to understand the relevance in this case of the question of the intended purpose of acquisition, and for possibly becoming in consequence at cross purposes not only with the Special Commissioners but also with the parties, the reason may lie in my not being possessed of a certain knowledge about this subject which is obtainable outside the confines of the Case Stated and the submissions and which to others conversant with the subject is commonplace and is to be taken for granted. I may some day come to realize or be told what it is that I have been blind to. But looking at para. (a) of subsection (3) and doing my utmost to understand it in the light of subsections (1) and (2) and para. (b) of subsection (3) and trying to understand the problem solely from the Case Stated and the submissions, that is the state in which I inevitably find myself.

This appeal has been dismissed by a majority decision on 14 May 2005, when I was as yet not ready with a decision on my part. With the benefit of my present finding that the Special Commissioners were right in their ultimate decision, I too would have decided that the appeal be dismissed.

Raus Sharif J:

This is an appeal from the judgment of the High Court at Kuala Lumpur, dismissing an appeal by Mount Pleasure Corporation Sdn. Bhd. (the appellant) against the decision of the Special Commissioners of Income Tax (the Special Commissioners).

The relevant facts to this appeal are these. Pursuant to a director's resolution dated 4 September 1971, the appellant purchased holdings No. 45, and 39, Bandar Batu Feringgi, Section 2, Penang and holdings Nos. 78(1), 78(2) and 80, Mukim 17, North East District of Penang (the said property) for RM570,000. On 12 April 1972, the appellant submitted layout plans to construct on the said property, a hotel complex and a theatre club and to operate thereupon a casino. Instead, the layout plans for the alternated use and development of the said property, namely, commercial and housing development were approved in March 1979. By a notice of additional assessment dated 11 May 1989, for the year of assessment 1984, the appellant was assessed for income tax by the respondent amounting to RM1,464,986.30 based on the original cost of the said property. Likewise, for years of assessment 1985 to 1987, by notices of additional assessment dated 22 July 1989, assessments were raised by the respondent based on the original cost of the said property as at 1971.

The appellant appealed against the said additional assessments to the Special Commissioners.

The issue raised before the Special Commissioners was whether the cost of the said property should be the market value in 1978 or the actual cost when the said property was acquired in 1971. The Special Commissioners after hearing the parties decided that the cost of the said property should be the original cost as at the year of acquisition in 1971 and not its market value in 1978 as stipulated in the provision of s. 35(3)(a) of the Income Tax Act 1967 (the Act).

The appellant appealed against the said decision to the High Court. The same issue was raised before the learned High Court Judge. The learned High Court Judge agreed with the decision of the Special Commissioners and accordingly dismissed the appeal with costs. Hence, this is the appeal to us by the appellant.

Before us, the same issue was raised again.

It was contended by the appellant that the learned High Court Judge was wrong to hold that there was an overwhelming evidence before the Special Commissioners to justify their conclusion when the evidence was consistent with the said property having been acquired by the appellant as an investment. The gist of the appellant's submission was that the primary facts found by the Special Commissioners were not based on evidence and the inferences made by the Special Commissioners were wrong. According to the appellant, there was no basis in law for the Special Commissioners to have arrived at their conclusions.

The respondent contended otherwise. The respondent submitted that the appellant's appeal should fail as (i) the appellant's intention in purchasing the said property was not for investment but for trading at the time when the said property was purchased; (ii) the said property was a trading stock; (iii) the Special Commissioners did not go behind the statement of agreed facts in arriving at the decision; and (iv) the appellant failed to discharge the onus that the assessments were erroneous.

Findings

The duty of the court when hearing a tax appeal is well laid down by Lord Diplock in *Chua Lip Kong v. DGIR* [1982] 1 MLJ 235 where his Lordship stated:

> Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself … From the primary facts admitted or proved the Commissioners are entitled to draw inferences, such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of facts.

Chua Lip Kong's case was followed by the Supreme Court in *Lower Perak v. KPHDN* [1994] 3 CLJ 540, where the Supreme Court had referred to the much quoted principles enunciated by Lord Radcliffe in *Edward v. Bairstow and Harrison* [1956] AC 14; [1955] 3 All ER 48. Lord Radcliffe said as follows:

> I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of facts, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

Further, it is settled law that in an appeal to the Special Commissioners against an assessment, the onus is on the taxpayer to establish evidence that the assessment should not have been made. When the taxpayer failed to establish such evidence, the assessment must stand. The same onus applies when the taxpayer appeals to the High Court and to this court.

In this appeal, the appellant contended that the said property was acquired for investment with the intention to develop the said property and retained them as fixed asset. Thus, it is for the appellant to adduce evidence that the said property was acquired for investment. On this issue, the Special Commissioners made the following findings:

> The question of what the intention of a taxpayer was when he acquired an asset, that is to say, whether as an investment or not has to be determined by inferences from proved facts (see *NYF Realty Sdn. Bhd. v. Comptroller of Inland Revenue* [1974] 1 MLJ 182). In the appeal before us none of the witnesses called by the appellants gave any admissible oral evidence to establish that the said property was bought as an investment. The only witness who said that it was bought as an investment is SP3 who was engaged by the appellants only with regard to this appeal on 3rd July 1985. Thus, he had no personal knowledge of the affairs of the appellants prior to that date. In the event his evidence relating to matters concerning the appellant before the appeal was filed, in particular, his statement that the said property was bought as an investment, is admissible as being hearsay. Thus, the appellants were left with no oral evidence in support of their case.

On the question of intention of the appellant to utilize the land as a casino, the Special Commissioners came to the following findings:

> … the plan to operate a casino in the hotel complex cannot be taken into account as no licence was granted to operate it in the Mount Pleasure. In any event it must be noted that the obtaining of a casino licence was something that was wholly beyond the control of their will. It was something severely circumscribed and its implementation indefinite in point of time. Thus the intention of obtaining a casino licence cannot amount to an intention in law (See *Cunliffe v. Goodman* [1950] 1 All ER 720, *Kirkham v. Williams (Inspector of Taxes)* [1991] STC 342; *Lower Perak Co-operative Housing Society Bhd. v. Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713. It therefore, follows that the intention of operating a casino can be of no assistance in determining the state of the said property.

We agree with the Special Commissioners. Clearly, there was no evidence to support the appellant's contention that the said property was bought for an investment. The appellant's intention or motive alone could not prevail over what the appellant in fact did. *Whiteman on Income Tax*, 3rd edn says at p. 165:

> As a general proposition the test of whether trading has occurred is objective. Thus the actions and methods of the alleged trade need to be considered rather than motives and intentions of the alleged trader in adopting those methods.

Thus, to ascertain the business of the appellant, we must look at what business it actually carries on and not what business it professes to carry on (*I. Investment Ltd. v. Comptroller-General Of Inland Revenue* [1975] 2 MLJ 208). In the present case, as found by the Special Commissioners that there was no admissible oral evidence to establish that the said property was acquired as an investment. The Special Commissioners in deciding what was the intention of the appellant when they acquired the said property, whether as an investment or not, made inferences from the facts proved. From the facts

proved, the said property was not the only property the appellant dealt with at the material time. Together with the said property, the appellant has had five dealings in properties. Thus, the Special Commissioners were right to conclude that the appellant's frequent dealings raised a *prima facie* inference that the appellant was carrying on a business of land dealings either as a land developer or as a real estate merchant. As found by the Special Commissioners, the appellant had failed to rebut the said inference.

The Special Commissioners also pointed out that the presumption against the appellant was further strengthened by the fact that the appellant's Memorandum and Articles of Association did not authorize them to purchase land for purpose of investment except with surplus funds which they did not have. From the evidence, the purchase of the said property was financed by family funds. This fact does not support the appellant's contention that the said property was acquired for an investment.

The Special Commissioners further found that even though the appellant claimed that the said property was transferred as stock-in trade in 1978, the said property remained as fixed assets in the appellant's account until 1982. No explanation was offered by the appellant for this discrepancy. Thus, the Special Commissioners was right in their findings that the appellant's accounts did not support the appellant's contention that the said property was acquired for an investment.

In conclusion we are satisfied, as was the learned High Court Judge, that there is sufficient evidence to support the Special Commissioners' findings that the said land was not acquired in 1971 as an investment and the appellant had failed to discharge the onus on him that the assessments by the respondent were erroneous.

My learned brother Mokhtar bin Sidin, JCA has seen the judgment in draft and agreed to it.

We would, therefore, dismiss the appeal with costs.